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Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 46

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,
Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

W. H. DANNAT PELL,
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Attorneys for Respondent.

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Supreme Court of the United States,

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No. 892

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,
Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

I.

The Opinions of the Court Below.

The opinion and dissenting opinion in the Supreme Court of Wisconsin filed January 16, 1940, are reported in the Wisconsin Advance Sheets 233 Wis. 286 (1940), in 289 N. W. 677, and in the Record at p. 77. They do not appear to have been reported as yet in the Wisconsin Official Reports.

II.

Jurisdiction.

The assessment involved in this case was made by the Wisconsin State Tax Commission pursuant to Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended (set forth

in full in the Appendix of Petitioners Brief), which levies what is entitled a "Privilege Dividend Tax" (R. 46, 19). The tax is stated to be for "the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in * * *" Wisconsin. The rate of tax is 2½% of dividends declared and paid.

The jurisdictional statement in the brief filed by counsel for petitioners indicates that they predicate the jurisdiction of this court upon Section 237(b) of the Federal Judicial Code (28 U. S. C. A. 344(b)) upon the ground that the assessment of tax made by the Wisconsin State Tax Commission against the respondent was held by the Supreme Court of Wisconsin to be invalid under the Fourteenth Amendment to the Constitution of the United States.

In its opinion the Supreme Court of Wisconsin states that the respondent contended that the application of the assessment to it deprived it of property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section 1 of the Constitution of the State of Wisconsin. The opinion of the Court does not indicate that it intended to hold the Fourteenth Amendment to the Constitution of the United States to be more stringent than Article VIII, Section 1 of the State Constitution in restricting the state to objects of taxation within its borders. The logical inference is that, while it was persuaded to do so by the reasoning of this court, in *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77, it intended to hold the law unconstitutional under both the State and Federal constitutions. If this is correct, this court is without jurisdiction. *Lynch* v. *New York ex rel. Pierson* (1934) 293 U. S. 52; *Leathe* v. *Thomas* (1907) 207 U. S. 93; *Ashwander* v. *Tennessee Valley Authority* (1936) 297 U. S. 288, at 347.

III.

Statement of the Case.

The statement of facts as set forth in the petition for certiorari and brief in support of petition for writ of certiorari filed on behalf of the State of Wisconsin and Elmer E. Barlow as Commissioner of Taxation for the State of Wisconsin is substantially correct. There are several additional facts appearing in the record and relied upon by the respondent before the Supreme Court of Wisconsin which would seem to warrant statement, however.

During the years here involved J. C. Penney Company paid a franchise tax as a domestic corporation to the State of Delaware. During the same period it was qualified to do business in New York and paid the franchise tax of that state. It filed returns and paid income taxes to the State of Wisconsin for the years 1934, 1935, and 1936 (R. 27).

After the withdrawal of money from Wisconsin representing the proceeds of the sale of merchandise in that state (see petitioners' statement of facts, p. 16 of petitioners' Brief in Support of Petition for Writ of Certiorari) no Wisconsin employee of J. C. Penney Company had anything to do with it (R. 30).

As a Delaware corporation, J. C. Penney Company derives its power to pay dividends from Section 34 of the corporation law of that state which is, as follows:

> "The directors of every corporation created under this chapter subject to any restrictions contained in its certificate of incorporation shall have power to declare and pay dividends upon the shares of its capital stock, either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27, and 28 of this Chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding year" (R. 38).

The resolutions pursuant to which the dividends in question were declared specifically stated that they were declared from the surplus of the company (R. 35). At the time of the declaration of each of said dividends, J. C. Penney Company had a surplus (R. 35) which represented its accumulated earnings for many years derived from all of the states of the United States (R. 41, 42).

The respondent, J. C. Penney Company, does business both within and without the State of Wisconsin (R. 27). The manner of computation of the tax in such a case is set forth in Subsection 4 of Section 3 of the law. In brief the total amount of money paid to stockholders as a result of each dividend was multiplied by the percentage of total earnings for the year preceding, made up of Wisconsin earnings for such year (such percentage being calculated by means of the Wisconsin income tax return of J. C. Penney Company for said year). The result was multiplied by the rate of tax (2½%) giving the amount of tax. This method is illustrated by Exhibit "A" opposite page 46 of the record. The calculation there set forth was later modified, however, by the substitution of .025 as the rate of tax (R. 20). Only an insignificant amount of the tax involved was assessed with respect to dividends paid to Wisconsin residents (R. 9).

The Supreme Court of Wisconsin held the assessment of the State Tax Commission invalid upon the ground that in a case involving a foreign corporation the state had no jurisdiction to levy an excise tax upon a transaction, i.e., the payment and receipt of dividends, when no part of such transaction took place in Wisconsin.

IV.

ARGUMENT.

Summary of Argument.

(1) The Supreme Court of Wisconsin was clearly correct in holding that a state has no jurisdiction to levy an excise tax upon transactions of a foreign corporation taking place beyond its territorial limits, and such a holding is neither novel nor doubtful. *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77; *St. Louis Compress Co.* v. *Arkansas* (1922) 260 U. S. 346; *Provident Savings Ass'n.* v. *Kentucky* (1915) 239 U. S. 103.

(2) The application of the tax to the payment and receipt of the dividends here involved cannot be sustained upon the ground that the surplus funds used by respondent for their payment may have been made up in part of income originally accruing to respondent from Wisconsin business. *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77; *Provident Savings Ass'n.* v. *Kentucky* (1915) 239 U. S. 103; *Beidler* v. *South Carolina Tax Commission* (1930) 282 U. S. 1; *Rhode Island Trust Co.* v. *Doughton* (1926) 270 U. S. 69; *Newark Fire Ins. Co.* v. *State Board* (1939) 307 U. S. 313; *Wheeling Steel Corp.* v. *Fox* (1936) 298 U. S. 193.

(3) The assessment cannot be sustained on the ground that the tax is in substance a tax on doing business measured by net income, as the Supreme Court of Wisconsin has held that the tax is an excise upon the payment and receipt of dividends, and this court is bound by this construction. *Knights of Pythias* v. *Meyer* (1924) 265 U. S. 30; *Guaranty Trust Co.* v. *Blodgett* (1933) 287 U. S. 509. The fact that a foreign corporation engages in activities within a state which might be taxed does not justify a tax on its activities outside of the state. *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77; *Provident Savings Ass'n* v. *Kentucky* (1915) 239 U. S. 103; *Atlantic Lumber Co.* v. *Comm'r* (1936) 298 U. S. 553. Nor is the tax "in substance"

an income tax since its incidence is neither upon the doing of business nor earning of income but upon the payment and receipt of dividends. *American Mfg. Co.* v. *St. Louis* (1919) 250 U. S. 459.

The assessment cannot be sustained upon the ground that the tax is an income tax upon stockholders because only an insignificant number of respondent's stockholders reside in Wisconsin. The derivation of a part of the income of the corporation from Wisconsin may not be attributed to stockholders as the corporate entity must be respected. *Klein* v. *Board of Supervisors* (1930) 282 U. S. 19; *Beidler* v. *South Carolina Tax Commission* (1930) 282 U. S. 1; *Rhode Island Trust Co.* v. *Doughton* (1926) 270 U. S. 69; *Miller* v. *Milwaukee* (1927) 272 U. S. 713. Furthermore, the State of Wisconsin has shown no intent to change its substantive law requiring that the corporate entity be respected. *Ellinger* v. *Wisconsin* (1938) 229 Wis. 71, 281 N. W. 701.

(4) The Supreme Court of Wisconsin correctly applied the applicable previous decisions of this court and as the principles of jurisdiction involved are settled the petition should be denied.

POINT ONE.

The Supreme Court of Wisconsin was clearly correct in holding that a state has no jurisdiction to levy an excise tax upon transactions of a foreign corporation taking place beyond its territorial limits.

Rule 38 of the rules of this court lays down certain principles for the guidance of counsel with respect to the nature of cases in which certiorari will or may be granted. The portions of this rule applicable to the instant case are, as follows:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"* * *"

This rule indicates that in order to warrant consideration by this court a case of this sort must usually (1) involve a novel question of law, or (2) have been decided by the state court "in a way probably not in accord with applicable decisions of this court". This case falls within neither classification.

The tax law (Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended—see appendix petitioners' brief) provides that the tax is a *"privilege dividend tax"* and that it is a tax *"For the privilege of declaring and receiving dividends* * * *."* In a previous opinion, *State of Wisconsin ex rel. Froedtert G. & M. Co. Inc.* v. *Tax Commission* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, the Supreme Court of Wisconsin took occasion to define the exact nature of the tax. The following quotations would seem to be a fair statement of its conclusions:

"The tax is a privilege tax, or an excise tax, one form of which is a tax imposed upon the transfer of property" (p. 231).

"However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders" (p. 233).

"If the tax is an excise tax, and we hold that it is, it is entirely immaterial upon whom the burden of it ultimately falls. In a sales tax it falls, usually at least, upon the purchaser. In a stamp tax on deeds, it usually falls on the seller. In an inheritance tax, it falls on the recipient of the property. In the stock transfer tax above referred to it probably fell

upon the broker consummating the transfer. In a stamp tax on checks, it falls on the drawer of the check. In none of the cases is it a personal property tax against the person upon whom the burden of it ultimately falls'' (p. 243).

In its opinion in this case the Supreme Court of Wisconson repeated the second quotation 233 Wis. 286, at p. 292 (289 N. W. 677, at p. 679).

The evidence is clear and undisputed that in declaring and paying the dividends sought to be taxed all of the necessary acts were performed by J. C. Penney Company in the State of New York, that the dividends were paid from its surplus in the form of general funds standing to its credit in New York banks, that no part of the funds so applied could be earmarked as Wisconsin earnings or even as earnings for any particular year, that J. C. Penney Company performed no act in connection with the payment of such dividends in the State of Wisconsin, and that none of its books or records necessary in connection with the declaration or payment of such dividends were located in Wisconsin (R. 31, 32, 35, 41).

The transactions took place in New York pursuant to an authority conferred by the corporation laws of Delaware and exercised in New York as a result of the comity of that state accorded to a foreign corporation duly qualified to do business there. In other words Wisconsin sought to levy a privilege tax upon transactions of a foreign corporation in a case in which the privilege was not conferred by that state and in which the transactions concerned took place entirely outside its territorial limits.

It is clear from numerous decisions of this court that a state has no jurisdiction to levy a transaction tax under such circumstances. *Connecticut General Life Ins. Co.* v. *Johnson* (1938), 303 U. S. 77; *St. Louis Compress Co.* v. *Arkansas* (1922), 260 U. S. 346; *Provident Savings Ass'n* v. *Kentukcy* (1915), 239 U. S. 103. In the first case cited, this court said (at pp. 80-81):

"Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *New York Life Insurance Co.* v. *Head*, 234 U. S. 149; *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346; *Compania General De Tobacos* v. *Collector*, 275 U. S. 87; *Home Insurance Co.* v. *Dick*, 281 U. S. 397; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143; *Boseman* v. *Connecticut General Life Ins. Co.*, 301 U. S. 196; *People ex rel. Sea Insurance Co.* v. *Graves*, 274 N. Y. 312; 8 N. E. (2d) 872; *cf. Provident Savings Life Assurance Society* v. *Kentucky*, 239 U. S. 103."

See also

Baldwin v. *Seelig* (1935), 294 U. S. 511.

Certainly the rule laid down in these cases is neither novel nor doubtful. Counsel for petitioners in order to avoid its force, advance several suggestions as to possible jurisdictional bases upon which they think the application of the tax to the respondent might be sustained. Respondent submits that such suggested bases are without foundation, and that many previous rulings of this court so hold.

POINT TWO.

The application of the tax to the payment and receipt of the dividends here involved cannot be sustained upon the ground that the surplus funds used by respondent for this payment may have been made up in part of income originally accruing to respondent from Wisconsin business.

In Point A of their argument, counsel for petitioners argue that the Supreme Court of Wisconsin erroneously applied the ruling of this court in *Connecticut General Life*

Ins. Co. v. *Johnson* (1938) 303 U. S. 77, and in support of this contention quote from the dissenting opinion of Mr. Justice Fowler in the instant case. The pertinent part of this quotation is, as follows:

> "The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business transacted in the State of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed."

The facts show that the connection between Wisconsin earnings and the surplus of the corporation from which the dividends were paid is tenuous and that any Wisconsin earnings which might have been included had come to rest in New York before the occasion arose to pay them out as dividends. Without question Wisconsin had jurisdiction to tax the income of the corporation as it accrued to it in Wisconsin and it did so, but this characteristic of original derivation affords no basis of jurisdiction to tax at a later date a transaction in which such income then in the form of surplus may have been involved. Certainly Minnesota may not levy a sales tax on New York sales of automobiles on the ground that Minnesota iron was used in their construction. As the law with respect to intangibles has generally developed through the application of rules analogous to those applicable to personal property such an example seems pertinent. See *Wheeling Steel Corp.* v. *Fox* (1936) 298 U. S. 193.

In *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77, it was contended that California had jurisdiction to tax the receipt in Connecticut of premiums on reinsurance paid by California corporations to the plaintiff with respect to California risks because the origin of such premiums gave them a constructive situs in California. This court met that argument, saying (at p. 80):

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. [Citing]. It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

The reasoning of the majority opinion in this case holding the above reasoning of this court in *Connecticut General Life Ins. Co. v. Johnson* applicable appears in 233 Wis. 286, pp. 292-296, and 289 N. W. 677, pp. 679-682 (R. pp. 82, 83, 84, 85), and merits careful attention.

In *Provident Savings Ass'n.* v. *Kentucky* (1915) 239 U. S. 103, the state levied a franchise tax upon insurance companies for the privilege of doing local business which was based upon a percentage of premiums received from business done within the state. The plaintiff company ceased doing business in Kentucky but continued to receive premiums from Kentucky residents with respect to policies previously executed. This court held that the tax could not be applied to the plaintiff because it was not enjoying the privilege taxed, although it had held at the same term in *Equitable Life Society* v. *Pennsylvania* (1915) 238 U. S. 143 that premiums mailed to an out-of-state office of a com-

pany doing a local business might be included in the price for the privilege of doing local business. In other words, the characteristic of derivation from Kentucky was not sufficient to sustain the taxation of their receipt outside of the state.

In *Beidler* v. *South Carolina Tax Commission* (1930) 282 U. S. 1, the state of South Carolina attempted to impose its inheritance tax upon unpaid dividends of a domestic corporation in a case involving a non-resident decedent. The fact that the corporation was a South Carolina corporation, and that its dividends were presumably at least in part earned there, was not sufficient to render them subject to the tax. See also *Rhode Island Trust Co.* v. *Doughton* (1926) 270 U. S. 69.

Various suggestions occur in the decisions of this court with respect to the situs of intangibles for tax purposes—state of incorporation, state of commercial domicile, state of use or application, see *Newark Fire Ins. Co.* v. *State Board* (1939) 307 U. S. 313; *Wheeling Steel Corp.* v. *Fox* (1936) 298 U. S. 193—but no case so far, as counsel for respondent have discovered, suggests that such a situs exists in the State of origin of intangibles which survives their use and application elsewhere, and the cases above referred to are conclusive that there is none.

POINT THREE.

The assessment of the Wisconsin State Tax Commission cannot be sustained on the ground that the tax is in "substance" a tax upon doing business measured by net income nor may it be sustained as an income tax upon the stockholder.

Counsel for petitioners in Point C of their brief suggest that as an income tax on earnings within the state is clearly valid, this court should look to the economic effect of the tax and sustain it as "in effect" a tax on doing business in

Wisconsin measured by net income—payment of the tax being postponed until such time as the income is paid out in dividends.

Counsel for petitioners seem to infer that the Supreme Court of Wisconsin in the case of *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, rested the authority to impose the tax in question on the power to tax the transaction of corporate business in the State of Wisconsin. It is true that the court said in that case 221 Wis. 225 (at p. 245):

> "We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived * * *".

A study of the language above quoted and its context discloses that it was used by the court in support of an argument that the derivation of income from within the state conferred jurisdiction upon it to tax the transaction occurring outside of the state involved in the payment and receipt of a dividend made up in part of such income. The language of the Wisconsin Court in the instant case forecloses any possible question on this point and clearly indicates that the language of that court quoted at p. 7 hereof, declaring the tax to be an excise upon a transaction, correctly presents its views. The argument of "constructive situs" based on derivation is that which was rejected by the majority of the court in this case, but was reiterated by Mr. Justice Fowler in his dissent.

This court has declared that it must accept "the decision of the highest court of the state fixing the meaning of state legislation, as though the meaning had been specifically expressed therein." *Knights of Pythias* v. *Meyer* (1924) 265 U. S. 30, at p. 32; *Guaranty Trust Co.* v. *Blodgett* (1933) 287 U. S. 509. This court is, therefore, bound by the construction by the Supreme Court of Wisconsin of the instant tax as "an excise or privilege tax upon the transaction in-

volved of transferring the dividends from the corporation to its stockholder" (221 Wis. 225, at 233), and is not at liberty to construe it otherwise.

The mere fact that a corporation performs acts which might subject it to tax in one way does not justify an application of the taxing power of the state to a subject of tax beyond its jurisdiction. It was argued in *Connecticut General Life Insurance Co.* v. *Johnson* (1938) 303 U. S. 77 that since insurance companies were given a deduction in the amount of reinsurance carried in companies licensed to do business in California that exactly the same result could be obtained by limiting this deduction. Economically, of course, the result would have been the same. This court said (at p. 80):

> "It is said that the state could have lawfully accomplished its purpose if the statute had further stipulated that the deduction should be allowed only in those cases where the reinsurance is effected in the state or the reinsurance premiums paid there. But as the state has placed no such limitation on the allowance of deductions, the end sought can be attained only if the receipt by appellant of the reinsurance premiums paid in Connecticut upon the Connecticut policies is within the reach of California's taxing power."

See also *Provident Savings Ass'n.* v. *Kentucky* (1915), 239 U. S. 103, referred to at p. 11, *supra.* Compare also *Atlantic Lumber Co.* v. *Comm'r. of Corporations & Taxation* (1936), 298 U. S. 553.

Should this court deem it fit to look to the economic effect of the tax, however, it is clear that it is not the equivalent of an income tax upon the corporation (or a tax on doing business measured by net income) because the incidence of the tax is upon the transaction of paying and receiving dividends, not upon the earning of income. This is illustrated by the case of *American Mfg. Co.* v. *St. Louis* (1919), 250 U. S. 459, in which a city license tax upon manufacturing was measured by sales of the manufactured articles wher-

ever made. The court felt that the measure of the value of the privilege was a fair one. It was argued that the incidence of the tax was upon sales rather than on manufacturing because, if the goods were not sold, there would be no tax. The court answered this, as follows (at p. 464):

> "* * * it is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses. In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The difference is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods."

It is clear that under the test discussed in this case the incidence of the tax is where the statute places it—on the payment and receipt of dividends. While in the case of manufacturing, it is hardly possible to conceive that any material portion of the goods manufactured should not be sold, it is indeed most likely that a large portion of income realized will never be paid out in dividends. A corporation may wish to expand in which case its surplus is invested in capital assets. By an increase in the par value of its shares or a declaration of a stock dividend, the surplus may find its way into the capital account of the corporation and no longer be available at all for dividends. Most corporations carry a moderate surplus from the net income in good years for the purpose of meeting losses incurred in bad ones. If the surplus is lost, it, of course, may not be paid out in dividends. Again, if the capital of the corporation is impaired, the net income must be used to make up the deficit in this account, and may not be used for dividends. Again, a corporation may have a very profitable business in Wisconsin from which it derives a large income and an unprofitable business elsewhere through which it loses its Wisconsin income. It is self-evident that two corporations

might each have net incomes in Wisconsin of $100,000 and one be required to pay a tax of $2,500, and the other no tax at all at any time. The foregoing illustrations must render it clear that the fact that a corporation derives a net income from Wisconsin has almost nothing to do with its liability to pay a tax. Surely it would not be proper for this court to pick another subject to tax which is admittedly within the taxing jurisdiction of the state, but which has no relation to the occasion of the imposition of the tax either nominally or substantively and sustain the tax as a tax on such subject.

On page 22 of their brief, counsel for the petitioners cite several cases involving the Civil War income tax. One of the provisions of this law required corporations to deduct the amount of an income tax from dividends paid to stockholders and there was considerable controversy as to whether the tax was on the shareholder or the corporation. The provision with respect to the deduction of the amount of tax from dividends was a part of a scheme for the measurement of income devised by Congress long before the adoption of the method used in the present law. The method employed was to tax the corporation with respect to funds going into each of the "corporate pockets" into which income might be put. Dividends were simply one of those named. *Railroad Co.* v. *Collector* (1879), 100 U. S. 595. The law was a Federal and not a state law, and the method of measurement of income was probably approximately fair. Those cases are hardly sufficient to warrant a state's selecting only one use to which income may be put and denominating a tax thereon a corporate income tax.

The petitioners next suggest that the tax might be deemed the equivalent of an income tax on stockholders and urge as a basis of jurisdiction that the respondent derives a part of the income which ultimately inures to its stockholders from within the state. *Miller* v. *Milwaukee* (1927), 272 U. S. 713, is cited as authority that at times the corporate veil may be penetrated.

This court has repeatedly held, however, that the corporate entity must be respected for tax purposes saying:

> "But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true * * *"

Klein v. *Board of Supervisors* (1930) 282 U. S. 19 (at p. 24); *Beidler* v. *South Carolina Tax Commission* (1930) 282 U. S. 1; *Rhode Island Trust Co.* v. *Doughton* (1926) 270 U. S. 69.

In *Miller* v. *Milwaukee, supra,* this court recognized this to be the general rule, but found that the state was attempting to urge the inviolability of the corporate entity in order to reach a prohibited result. The instant case resembles the *Beidler* and *Rhode Island Trust Co.* cases, and no special circumstances exist sufficient to withdraw it from the operation of the rule of those cases.

Furthermore, it seems to be the policy of the State of Wisconsin to consider the corporation a separate entity for tax purposes. *Ellinger* v. *Wisconsin* (1938) 229 Wis. 71, 281 N. W. 701. In the absence of some indication that the state desires to change its substantive law treating the corporation as a separate entity in order to extend its jurisdiction to tax (and neither the statute nor the decision of the Supreme Court of Wisconsin contains any such indication), it would hardly lie within the province of this court to reverse the judgment upon the ground that, if the state desires to change its rule of substantive law it may constitutionally do so.

Conclusion.

In Point B of their brief, counsel for petitioners have argued that there is no case involving the application of a statute of the type of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, to facts similar to those here involved, and this must be conceded. However, a study of the foregoing points of this brief will disclose that the prin-

ciples of jurisdiction involved are settled and have been repeatedly applied by this court in cases which are indistinguishable except for the name given to the tax sought to be imposed. As the decision of the Supreme Court of Wisconsin is clearly correct, it would serve neither the interest of the State of Wisconsin nor of the respondent to permit further litigation and the consequent delay in the final settlement of the issues here involved.

For the foregoing reasons, respondent prays that petitioners' Petition for Writ of Certiorari to the Supreme Court of Wisconsin be denied.

Respectfully submitted,

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